

BEFORE THE
GOVERNING BOARD
RIO SCHOOL DISTRICT
COUNTY OF VENTURA
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Katherine Dickinson, Erica Rodriguez,
and Aurora Zamudio,

Respondents.

OAH Case No. L2011031039

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 12, 2011, in Oxnard, California.

Pamela A. Dempsey, Attorney at Law, represented Carolyn Bernal (Bernal), Director of Human Resources of the Rio School District (District).

John F. Kohn, Attorney at Law, represented Katherine Dickinson (Dickinson), Erica Rodriguez (Rodriguez), and Aurora Zamudio (Zamudio), collectively referred to as Respondents.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

FACTUAL FINDINGS

1. Director Bernal filed the Accusation in her official capacity.
2. Respondents are certificated employees of the District.
3. The Superintendent of the District and Director Bernal recommended to the Governing Board of the District (Governing Board) the reduction or discontinuation of the services set forth in factual finding number 4.

4. On March 10, 2011, the Governing Board adopted Resolution number 1011/14, reducing or discontinuing the following services for the 2010-2011 school year:

<u>Service</u>	<u>FTE¹ Reduction</u>
Classroom Teaching Services (Grades 4 and 5)	2.00
Classroom Teaching Services (Grades 6 through 8)	
Social Science	1.00
English	1.00
Science	1.00
Special Education Services	<u>1.75</u>
Total	6.75

5. On March 11, 2011, Director Bernal provided written notice to Respondents that she recommended the termination of Respondents' services for the 2011-2012 school year due to the reduction of particular kinds of services. Director Bernal also provided notice to the Governing Board that she was recommending the termination of Respondents' services. Respondents filed timely requests for hearing.

6. The District timely filed and served the Accusation and other required documents on Respondents. Respondents thereafter timely filed Notices of Defense, seeking a determination of whether cause exists for not reemploying them for the 2011-2012 school year.

7. All prehearing jurisdictional requirements have been met.

8. The services set forth in factual finding number 4 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.²

9. The Governing Board took action to reduce the services set forth in factual finding number 4 because of the potential loss of State funding and the uncertainty surrounding the District budget for the 2011-2012 school year because of such potential loss. The District is experiencing growth in enrollment, and the losses of revenue may not be as high as feared. However, its decision to reduce or discontinue the particular kinds of services in light of the potential loss of revenue is neither arbitrary nor capricious but is rather a proper exercise of the District's discretion.

¹ Full-time equivalent position.

² All further references are to the Education Code.

10. The reduction of services set forth in factual finding number 4, given the possible reduction in State funding and the District's need to remain solvent to serve its students, is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

11. On May 27, 2010, the Governing Board adopted a policy entitled "Competency Criteria for Purposes of Layoff and Reemployment of Certificated Employees." In pertinent part, the policy states: "Pursuant to Education Code section 44955, the District has a specific need to hire and retain teachers who possess credentials or certifications authorizing instruction in all special education areas, including counselors and nurses. In addition, the District has a need and interest in hiring and retaining teachers . . . who have the training and certification for dual immersion instruction. . . . [¶] In addition to possession of a currently valid clear or preliminary teaching credentials and other certifications authorizing instruction in one or more of the identified specialties, the District also has an interest that the teachers are competent to render the service. Competency, therefore, includes the teacher's actual experience in the District teaching the class, specialty or discipline." (Exhibit 5.)

12. The District has a dual immersion program in which instruction is provided to students in English and in Spanish. It is the District's goal that at the conclusion of the Fifth Grade students enrolled in the program will be fluent and culturally aware in English and in Spanish. Director Bernal differentiated the program from traditional bilingual instruction programs in which the goal is for students with limited English language ability to achieve proficiency in English. The program has been implemented over the past five years, and there are now dual immersion classes in Kindergarten through Fourth Grade. Teachers in the program must attend training in bilingual, bicultural subjects. The training typically consists of attendance at a one-week conference sponsored by the California Association for Bilingual Education (CABE).

13. The District skipped Pablo Hernandez (Hernandez) to provide service in the dual immersion program. Hernandez has a seniority date of August 23, 2006, and holds a clear multiple subject credential and a Bilingual Crosscultural Language and Development (BCLAD) certificate. Hernandez has taught in the dual immersion program for the past three years, and currently teaches a Third/Fourth Grade split class. Hernandez did not testify at the hearing, but the District established that he has attended the required training.

14. Respondent Rodriguez has a seniority date of August 24, 2005, and holds a clear multiple subject credential and a BCLAD certificate. She has not taught in the dual immersion program, but has taught students in English and in Spanish. Approximately five years ago, Respondent Rodriguez taught a Kindergarten class in which 10 students received instruction in Spanish and 10 received instruction in English. She attended a one-day CABE workshop regarding bilingual education instruction. By reason of the foregoing, Respondent Rodriguez has special training and experience necessary to teach in the dual immersion program.

15. Respondent Zamudio has a seniority date of August 23, 2006, and holds a clear multiple subject credential and a BCLAD certificate. She is junior to Hernandez, with whom she shares the date of hire, by virtue of application of the tie-breaking criteria, which application was not challenged at the hearing. She has taught a First Grade dual immersion class. She has also attended four of the CAFE conferences that serve as the training for the program, which she referred to as “two-way” conferences, an apparent reference to the instructional focus in dual immersion programs. She has also attended other CAFE conferences pertaining to more traditional bilingual instruction methodology. By reason of the foregoing, Respondent Rodriguez has the special training and experience necessary to teach in the dual immersion program.

16. Respondent Dickinson, who holds a preliminary single subject (science) credential, is the most junior employee teaching science classes. During the school year, she obtained additional authorizations in chemistry and in physics. Her seniority date is August 30, 2010.

17. The District did not retain any certificated employee junior to Respondents Dickinson and Zamudio to render a service which these Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 7.

2. The services listed in factual finding number 4 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 4 and 8.

3. Cause exists to reduce the number of certificated employees of the District by 6.75 FTEs due to the reduction of the services described in factual finding number 4, by reason of factual finding numbers 1 through 10.

4. Cause for the reduction of the services set forth in factual finding number 4 relates to the welfare of the District's schools and pupils within the meaning of section 44949, by reason of factual finding numbers 1 through 10, and legal conclusion numbers 1 through 3.

5. Cause exists to terminate the services of Respondents Dickinson and Zamudio, by reason of factual finding numbers 1 through 17, and legal conclusion numbers 1 through 4.

6. Section 44955, subdivision (b), provides, in pertinent part: “[t]he services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is *certificated and competent* to render.” (Emphasis added.) “Certificated” is defined by the provisions of the Education Code pertaining to credentials. Respondent Rodriguez holds a BCLAD, which allows her to provide instruction in a dual immersion class.

“Competent” has been defined by the courts. In *Forker v. Board of Trustees* (1994) 160 Cal.App.3d 13, 19, the court defined the term in a reemployment proceeding under section 44956, in terms of the teachers’ skills and qualifications, specifically, as “relating to special qualifications for a vacant position, rather than relating to the on-the-job performance of the laid-off permanent employee.” In doing so, the court noted that courts in reduction in force cases, namely *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 714-15, and *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648, 654-55, had interpreted the term in a similar manner.

Courts in analogous layoff and reemployment contexts, construing provisions similar to section 44955, have recognized that school districts have discretion to establish rules to define teacher competency. Thus, after reviewing earlier cases, the court in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 565 (*Duax*), wrote: “Hence, from these authorities we conclude that a board’s definition of competency is reasonable when it considers the skills and qualifications of the teacher threatened with layoff.” (See also: *Martin v. Kentfield School District* (1983) 35 Cal.3d 294, 299-300; *Forker v. Board of Trustees*, *supra*.)

In *Duax*, the governing board had established a standard of competency that required one year of full-time teaching in the subject area within the last ten years. The court found such standard “clearly related to skills and qualifications to teach” and therefore a reasonable one. (*Duax, supra*, 196 Cal. App.3d 555, at p. 567.) The court also concluded that the standard did not define competency too narrowly.

The District has established competency criteria that, in pertinent part, requires certificated employees to have “actual experience in the District teaching the class, specialty or discipline” at issue. The criteria relate to the skills and qualifications of certificated employees, and may be used by the District in implementing the layoffs. The rule does not refer to a specific period of time in which the experience must have been acquired, but heeding the warning in *Duax*, it must not be construed too narrowly, such as construing it to limit qualifying experience to current experience. Moreover, the words “class, specialty, or discipline” are sufficiently broad to include bilingual instruction even if outside the specific dual immersion model.

Therefore, reasonably construing the District's competency rule, Respondent Rodriguez is competent to teach in the dual immersion program. She has taught classes in Spanish and in English, the languages in the dual immersion program, and has in fact done so in the same classroom. She has actual experience in bilingual teaching within the past five years.

7. Districts are permitted to disregard seniority, or "skip" junior employees, in accordance with section 44955, subdivision (d): "Notwithstanding subdivision (b), a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons: (1) The district demonstrates a specific need for personnel to teach a specific course or course of study, or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course of study or to provide those services, which others with more seniority do not possess. . . ."

In *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127 (*Bledsoe*), a district was able to skip two junior employees because of the district's demonstrated need for teachers with experience in instruction in a community day school. The junior teachers possessed special training and experience that enabled them to meet the district's specialized needs for alternative education. They had taken courses in many subjects that covered areas of instruction, had training in areas related to working with difficult students, and had actual experience in dealing with the community day school students. The court concluded that even though the respondent in that case possessed the basic qualifications to teach in the community day school, he lacked the additional, or special training and experience required for the position.

In this case, the District has established, and Respondents do not dispute, the District's specific need for qualified certificated employees to teach in the dual immersion program. As in *Bledsoe*, the District has a specific need for personnel to meet the special needs students in its dual immersion program. However, the District did not establish that certificated employees senior to Hernandez do not possess the requisite special training or experience. While Hernandez has experience in the dual immersion program and has taken the CAFE training, Respondent Rodriguez possesses similar bilingual training and experience. The District did not show that the dual immersion program is so different from other bilingual instruction programs to sufficiently differentiate Hernandez' training and experience from Respondent Rodriguez'. Nor did the District establish that the relatively short CAFE training received by Hernandez constitutes "special" training that Respondent Rodriguez does not have or cannot readily acquire. Rather, as set forth in factual finding number 14, Respondent Rodriguez, a more senior employee, possesses the special training and experience to teach in the dual immersion program.

8. Cause does not exist to terminate the services of Respondent Rodriguez, by reason of factual finding numbers 12 and 14, and legal conclusion numbers 6 and 7.

ORDER

1. The Accusation is sustained in part, and the District may notify Respondents Dickinson and Zamudio that their services will not be needed during the 2011-2012 school year due to the reduction of particular kinds of services.

2. The Accusation is dismissed with respect to Respondent Rodriguez.

DATED:_____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings